85-1253



No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

---

EAGLE-PICHER INDUSTRIES, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

JOE G. HOLLINGSWORTH
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 393-8535
*Attorney for Petitioner*

*Of Counsel:*
SPRIGGS, BODE & HOLLINGSWORTH
DONALD W. FOWLER
EDWARD M. FOGARTY

January 24, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED FOR REVIEW

Whether a shipyard worker "engaged in maritime employment" under the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") must independently satisfy the "nexus" requirement established for general admiralty jurisdiction in *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972), in order to sue a negligent vessel owner under Section 5(b) of the LHWCA, 33 U.S.C. § 905(b) (1982).

## PARTIES TO THE PROCEEDING BELOW

The following parties participated in the proceeding before the United States Court of Appeals for the First Circuit:

Appellant: United States of America (Respondent herein); and

Appellees: Eagle-Picher Industries, Inc. (Petitioner herein),
H.K. Porter Co., Inc.,
Owens-Illinois, Inc.,
Pittsburgh-Corning Corporation, and
Raymark Industries, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES—Continued

## LIST OF APPENDICES *



---

* Each of the appendices listed herein is reproduced in the separately bound Appendix to this petition, pursuant to Rule 21.1(k) of the Rules of this Court.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

No.

---

EAGLE-PICHER INDUSTRIES, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

---

## DECISION BELOW

Review is hereby sought of a decision of the United States Court of Appeals for the First Circuit reported at 772 F.2d 1023.[1]

---

[1] *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *aff'g in part, vacating in part* 589 F. Supp. 1571 (D. Me. 1984).

The opinion of the court of appeals is reproduced as Appendix A to this petition; the opinion of the district court is reproduced as Appendix B hereto. A prior opinion of the district court in this case, reported at 581 F. Supp. 963, is reproduced as Appendix C hereto. And the prior decision of the court of appeals in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985)—upon which the decision below was based—is reproduced as Appendix D.

## JURISDICTION

The judgment of the court of appeals was entered on September 18, 1985. Appellee Raymark Industries, Inc.'s timely petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals by order of October 30, 1985. A copy of that order is reproduced as Appendix E to this petition. *See* App. at 90a-91a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

## STATUTE INVOLVED

The statutory provision involved in this proceeding is Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b) (1982).[2] The text of that provision is reproduced as Appendix F to this petition. *See* App. at 92a.

Also relevant here are the provisions of Sections 2(3) and 3(a) of the LHWCA, 33 U.S.C. §§ 902(3) and 903 (a) (1982). The texts of those provisions are reproduced as Appendix G to this petition. *See* App. at 93a.

## STATEMENT OF THE CASE

### I. Proceedings in the District Court

This litigation arises out of civil actions initiated in the United States District Court for the District of Maine by approximately 100 current and former employees of the Portsmouth Naval Shipyard (or their survivors) against several corporations formerly engaged in the manufacture and sale of asbestos-containing insulation products. In each of those actions, the plaintiff claimed to have suffered personal injury as the result

---

[2] Section 5(b) of the LHWCA was amended prospectively in 1984. *See* Public Law No. 98-426, § 5(a)(1), 98 Stat. 1641. That amendment has no application to the instant litigation. *See id.*, § 28(c), 98 Stat. 1653. *See generally* note 20 *infra*.

of having been exposed, during the course of his shipyard employment, to asbestos and asbestos-containing products manufactured by one or more of the corporate defendants therein.

During the course of those proceedings, several of the defendant manufacturers—including petitioner Eagle-Picher Industries, Inc. ("Eagle-Picher")—filed third-party complaints against the United States, seeking contribution and/or noncontractual indemnification, on the the basis of the pervasive and dominant role played by the federal government in occasioning the plaintiffs' allegedly disease-causing exposure to asbestos and those wrongful and negligent acts and omissions of the federal government which were the proximate cause of the plaintiffs' injuries.

Following discussions and negotiations among the various parties, Eagle-Picher and other of the defendant manufacturers agreed to file a single "Model Third-Party Complaint," setting forth the claims of the manufacturers against the United States in all of the Portsmouth Naval Shipyard cases.[3] On or about August 1, 1983, the third-party defendant United States moved to dismiss (or, alternatively, for summary judgment on) the manufacturers' third-party complaint. The matter was fully briefed and argued before the Honorable Edward D. Gignoux, United States Senior District Judge.

By memorandum opinion and order dated February 23, 1984, Judge Gignoux granted the Government's motion with respect to eight of the nine counts set forth in

---

[3] A copy of that "Model Third-Party Complaint" is reproduced as Appendix H to this petition. *See* App. at 94a-107a.

A separate "Model Third-Party Complaint" was filed in connection with all similar cases arising out of the Bath Iron Works, a private shipyard. *See In re All Maine Asbestos Litigation*, 581 F. Supp. 963, 968 (D. Me. 1984) [App. at 27a, 29a-31a]. *See generally* note 4 *infra*.

the manufacturers' model complaint; he reserved judgment on Count VI of that complaint, wherein the manufacturers seek contribution and/or noncontractual indemnity from the United States on the basis of the wrongful and negligent acts and omissions of the federal government in its role as the owner of the naval vessels constructed and repaired at the Portsmouth Naval Shipyard. *In re All Maine Asbestos Litigation*, 581 F. Supp. 963 (D. Me. 1984) [App. at 27a-58a].[4]

On July 6, 1984, Judge Gignoux denied the Government's motion to dismiss Count VI of the manufacturers' third-party complaint. *See In re All Maine Asbestos Litigation (PNS Cases)*, 589 F. Supp. 1571 (D. Me. 1984) [App. at 18a-26a]. Thereafter, at the Government's request, he certified that decision for interlocutory appeal;[5] the Government petitioned the court of appeals for permission to appeal from Judge Gignoux's interlocutory

---

[4] The other counts of the manufacturers' third-party complaint set forth causes of action against the United States (i) as the seller of raw asbestos and asbestos-containing products (Counts I, II, III); (ii) as the promulgator of specifications requiring the use of asbestos in insulation products used at the Portsmouth Naval Shipyard (Counts IV, V); (iii) as the employer of the injured shipyard workers (Counts IV, V, VII, VIII); and (iv) all of the above, under the district court's general admiralty jurisdiction (Count IX). *See* 581 F. Supp. at 968, 980 [App. at 29a, 55a-56a]. Final judgment has yet to be entered with respect to the dismissal of those claims, and Eagle-Picher does not concede the propriety of such dismissal.

Judge Gignoux's treatment of the corresponding claims of the manufacturers against the United States in the related private-shipyard litigation (*see* note 3 *supra*) was identical to his actions here. Dismissing eight of the manufacturers' nine claims, he upheld the manufacturers' FTCA claim against the United States as the owner of those vessels constructed and repaired at the Bath Iron Works. *See* 581 F. Supp. at 975-77 [App. at 44a-50a]. The United States has not appealed from that ruling.

[5] That order is reproduced as Appendix I to this petition. *See* App. at 108a-109a.

order; and the court of appeals granted that petition on September 20, 1984.[6]

### II. Proceedings in the Court of Appeals

On appeal, the parties were in agreement as to the following basic premises:

1. The Federal Tort Claims Act subjects the United States to liability "in the same manner and to the same extent as a private individual under like circumstances," [7] "in accordance with the law of the place where the act or omission occurred." [8]

2. "[I]n determining whether the United States is subject to liability under the FTCA for contribution or indemnity on a theory of vessel-owner negligence, [the court] must look to the law that a Maine court would apply in analogous circumstances." [9]

3. "Here, the analogous 'private person' [is] a private shipyard [in Maine] that functioned as a 'vessel owner.'" [10]

4. "Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), confers a cause of action upon a person covered under the LHWCA [for injuries] caused by the negligence of a vessel." [11]

---

[6] That order is reproduced as Appendix J to this petition. *See* App. at 110a-111a.

[7] 28 U.S.C. § 2674 (1982).

[8] 28 U.S.C. § 1346(b) (1982).

[9] *In re All Maine Asbestos Litigation (PNS Cases), supra,* 589 F. Supp. at 1574 [App. at 22a-23a].

[10] Brief for the United States of America, at 7, *In re All Maine Asbestos Litigation (PNS Cases),* No. 84-1779 (1st Cir.) (filed Nov. 14, 1984) (hereinafter cited as "Government First Circuit Brief"). *See also* 589 F. Supp. at 1574 [App. at 23a].

[11] Government First Circuit Brief, *supra* note 10, at 7.

5. A private shipyard/vessel-owner in Maine *may* be held liable for contribution and indemnity for losses incurred by a third-party as the result of injuries to the shipyard/vessel-owner's employees caused by the shipyard/vessel-owner's negligence in its capacity as a vessel owner.[12]

Eagle-Picher argued before the court of appeals that these uncontested premises logically—and necessarily—compel the conclusion that the United States *may* be held liable here to Eagle-Picher as the result of injuries to federal shipyard workers caused by the Government's wrongful and negligent conduct in its capacity as vessel owner.[13]

---

[12] *See id.* at 9-10:

> Maritime common law permits contribution in non-collision cases . . . where the third-party defendant [*i.e.*, the private shipyard/vessel-owner] is liable in tort to the underlying plaintiff . . . .
>
> . . . . [In] *Jones and Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541, 2547 n.6 (1983), . . . the Supreme Court ruled that a *private* employee/vessel owner could be held liable in tort to its employees if negligent *qua* vessel owner. . . .

[13] Three district courts—the district court below, the United States District Court for the District of Hawaii, and the United States District Court for the Eastern District of Pennsylvania—had previously addressed the amenability of the United States to third-party FTCA claims in the circumstances presented here. In *every* case, the court had upheld an *identical* third-party claim against the Government in its capacity as vessel owner; and, in *every* case, the *same* Government motion for dismissal (or, alternatively, for summary judgment) had been denied. *See In re All Asbestos Cases*, 603 F. Supp. 599, 603-06, 612-13 (D. Hawaii 1984); *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119, 1132-39 (E.D. Pa. 1984); *In re All Maine Asbestos Litigation (PNS Cases)*, *supra*, 589 F. Supp. at 1575-76. *See also Johns-Manville Sales Corp. v. United States*, No. C 81-4561 RFP (N.D. Cal. Aug. 21, 1985) (Order re Motion to Dismiss) (slip op., at 19-23, 27) (motion for reconsideration pending). Judge Peckham's slip opinion in the *Johns-Manville* case is reproduced as Appendix K to this petition. *See* App. at 112a, 127a-130a, 132a.

The Government, on the other hand, argued that—despite the FTCA's mandate that the United States be held liable "in the same manner and to the same extent as a private individual under like circumstances"—and despite its concession that such a private shipyard/vessel-owner *may* be held liable under the LHWCA in the circumstances presented here—the United States may not be held liable here because the injured plaintiffs were covered by the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193 (1982).[14]

---

[14] *See, e.g.*, Government First Circuit Brief, *supra* note 10, at 9-10, *citing Johansen v. United States*, 343 U.S. 427 (1952), *and Patterson v. United States*, 359 U.S. 495 (1959).

Three district courts had previously rejected the same argument:

> The relevant inquiry under the FTCA must be . . . whether a *private* shipyard employer in Maine would be subject to liability to its employees in its capacity as a vessel owner. Such a private shipyard would not be protected by the *Johansen/Patterson* doctrine *because the shipyard would not be covered by the FECA. Indeed, by reason of section 905(b) of the LHWCA, a private shipyard employer-vessel owner would be subject to liability to its employees for negligence in its capacity as a vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 51 U.S.L.W. 4795 (1983). The argument of the United States that defendants' third-party claims for contribution are barred by maritime law because there can be no joint tortfeasor liability between it and defendants therefore fails.

*In re All Maine Asbestos Litigation, supra*, 589 F. Supp. at 1576 [App. at 25a-26a] (emphasis added).

> Section 5(b) of LHWCA permits *direct* actions against an employer *qua* vessel owner. [*Jones & Laughlin Steel Corp. v.*] *Pfeifer, supra*, 103 S.Ct. at 2548.[10]

---

[10] It makes no difference that FECA would preclude Mr. Colombo from suing the United States directly. Pittsburgh-Corning's sixth claim is brought under FTCA, so that the liability of the United States is the same as that of a private shipyard employer. Such an entity would be subject to direct

The court of appeals heard oral argument on January 9, 1985, and took the case under advisement.

### III. The *Drake* Decision

On August 27, 1985, the Court of Appeals for the First Circuit rendered a decision in another case (to which neither the United States nor Eagle-Picher was a party), in which it announced a new, absolutely unprecedented and, Eagle-Picher submits, entirely unfounded interpretation of Section 5(b) of the LHWCA, 33 U.S.C. § 905(b). What had been an undisputed, common ground of agreement in *this* case—*viz.*, the susceptibility of a private shipyard/vessel-owner to suit under 33 U.S.C. § 905(b) in the circumstances presented here—was suddenly and unexpectedly thrown into dispute. Specifically, in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1011-19 (1st Cir. 1985) [App. at 59a, 64a-81a], the court of appeals ruled that:

> (i) Whether a private shipyard/vessel-owner may be held liable under Section 905(b) depends upon

---

suit by its employee under section 5b as interpreted by the Supreme Court in *Pfeifer*.

*Colombo v. Johns-Manville Corp.*, 601 F. Supp. at 1137 & n.10 (emphasis in original). And:

> [U]nder the Federal Tort Claims Act the United States' liability is to be judged by the same standard applicable to a private person; therefore . . . FECA's exclusivity provision could not act as a bar [to the manufacturers' third-party claims]. . . .
>
> * * * *
>
> Because, if the United States had been a private employer, plaintiffs could have sued the United States for negligence as a vessel owner under *Jones & Laughlin*, these "*Scindia* claims" are also available to third-party plaintiffs as claims for contribution.

*In re All Asbestos Cases*, Civil No. 79-0382 (D. Hawaii Nov. 20, 1984) (Order on Motion for Reconsideration, at 2). The order denying the Government's motion for reconsideration in the Hawaii decision is reproduced as Appendix L to this petition. *See* App. at 134a-135a.

whether the injured LHWCA worker can—independently of his maritime employment—satisfy the "nexus" criterion for admiralty jurisdiction articulated by this Court in *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972);[15]

(ii) The federal vessel-owner claim of an LHWCA worker in circumstances identical to those presented here (which the court erroneously equated with the product-liability claim of such a worker against a land-based asbestos manufacturer[16]) does not inde-

---

[15] Prior to 1972, any tort occurring, however fortuitously, upon navigable waters was deemed to fall within the general admiralty jurisdiction of the federal courts. *See, e.g., Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 & n. 2 (1971); *The Plymouth*, 70 U.S. [3 Wall.] 20, 35-36 (1866). Frequently, "perverse and casuistic borderline situations" arose in which an injured party's "wholly fortuitous" location upon navigable waters resulted arbitrarily and inappropriately in the automatic application of maritime law. *See Executive Jet Aviation Co. v. City of Cleveland, supra*, 409 U.S. at 255, 267-68. In *Executive Jet*, this Court squarely confronted such problems, and ruled that the invocation of the courts' general maritime jurisdiction and the application of federal maritime law should not henceforth be determined by reference to a monolithic "locality test." Rather, it said, in the absence of a statute to the contrary (*id.* at 274 & n. 26), a tort shall be deemed "maritime" in nature only if it (i) occurs upon navigable waters ("situs") *and* (ii) bears some "significant relationship to traditional maritime activity" ("nexus"). *Id.* at 268.

[16] Perhaps the most clearly mistaken aspect of the court's opinion in *Drake* (and in this case) was its myopic failure to distinguish between a maritime worker's Section 905(b) negligence action against a vessel owner for breaches of duties of care imposed by federal law (as articulated by this Court in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981)) on the one hand, and such a worker's product-liability claim against a land-based manufacturer of putatively unsafe products to which he was fortuitously exposed while on navigable waters on the other. *See, e.g.*, 772 F.2d 1016 [App. at 75a] ("[S]uffice it to say that the facts here are essentially the same as in the other [underlying asbestos] cases cited which found that lack of sufficient relationship to traditional admiralty concerns negated the application of admiralty law

pendently satisfy the jurisdictional "nexus" criterion of *Executive Jet*; and:

(iii) Such a vessel-owner claim may therefore not be asserted under 33 U.S.C. § 905(b), and thus no

---

[to the product-liability claims of shipyard workers against asbestos-product manufacturers].").

The court of appeals failed, in other words, to distinguish between the state-law personal-injury lawsuit which the underlying plaintiff *did bring* against the several land-based asbestos-product manufacturers, and the federal maritime claim which such a worker *could have brought* under Section 905(b) against a negligent private vessel owner. The two types of actions are *not* the same—they involve entirely distinct and dissimilar torts; they are founded in different bodies of law; they are based upon different facts; and they involve entirely different parties alleged to have violated entirely different duties.

These obvious distinctions were clearly recognized by the Court of Appeals for the Fifth Circuit in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985). There, too, an attempt was made by an allegedly negligent vessel owner to equate the Section 905(b) claim against it with the product-liability actions so commonly asserted against asbestos-product manufacturers. Not surprisingly, the court of appeals unequivocally rejected that effort, carefully and thoroughly distinguishing the very same asbestos cases upon which the First Circuit relied in *Drake*. Among other things, the court noted:

> (i) "[N]one [of the underlying asbestos cases] involves . . . a § 905(b) claim against a vessel or its owner";
>
> (ii) "[None involves] a question about the scope of the federal court's admiralty jurisdiction under the Longshoremen's Act";
>
> (iii) "All are based on the alleged liability of a [land-based] manufacturer for injuries sustained in connection with the manufacturers' asbestos products"; and
>
> (iv) "Even more important, perhaps, all involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting [ordinarily applicable] state law with the federal common law of admiralty. . . . This question is not relevant to the present facts."

746 F.2d at 302 n.16.

> basis would exist for the assertion of a third-party claim for contribution or indemnification against such a vessel owner.

That decision was shortly to govern the court's disposition of the instant case.

### IV. The Decision Below

On September 18, 1985, the court of appeals extended its holding in *Drake* to the instant litigation, ruling (i) that, under its *Drake* decision, a private vessel-owner may not be sued under 33 U.S.C. § 905(b) in the circumstances presented here and (ii) that the United States may therefore not be sued in such circumstances under the FTCA. *See In re All Maine Asbestos Litigation (PNS Cases)*, *supra*, 772 F.2d at 1029-30 [App. at 11a-14a].

## REASONS FOR GRANTING THE WRIT

### I. Introduction: The 1972 LHWCA Amendments

Congress amended the LHWCA in 1972 "[i]n order to provide adequate income replacement for disabled workers covered under this law [through] a substantial increase in benefits." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 *U.S. Code Cong. & Admin. News* 4698-99. In addition to increasing worker benefits, however, Congress also addressed what it perceived to be two significant substantive problems with the then-existing law. Its resolution of those problems involved the enactment of those provisions which lie at the heart of the instant controversy.

First, Congress expressed concern—similar to the concern later expressed by this Court in *Executive Jet*—that coverage under the Act was being determined solely (and often arbitrarily) by whether an injury had occurred "upon the navigable waters of the United States." *Id.* at 10, 1972 *U.S. Code Cong. & Admin. News*, at 4707. In other words, coverage under the LHWCA—like the

general admiralty jurisdiction of the federal courts—was being determined solely by the accident of "locality" or "situs." Congress undertook to remedy that situation—in much the same way as this Court later undertook in *Executive Jet* to deal with the same problem in the general jurisdictional context—by amending the Act's definition of "employee":

> Subsection (a) amends the definition of the term "employee" contained in section 2(3) of the Act. The present definition merely excludes from the definition of "employee" a master or member of a crew, or any person engaged by the master to load, unload, or repair any small vessel. The new subsection retains this exclusion and states that the term includes any employee engaged in maritime employment, any longshoreman or other person engaged in longshoring operations, and any harbor-worker (including any ship repairman, shipbuilder, and shipbreaker).

*Id.* at 14, 1972 *U.S. Code Cong. & Admin. News*, at 4711.[17] *See also id.* at 10-11, 1972 *U.S. Code Cong. & Admin. News*, at 4707-08. Henceforth, Congress determined in 1972, coverage under the LHWCA would no longer hinge upon the fortuitous accident of "situs" alone; instead, LHWCA coverage is to be determined by "situs" *and* "*status*"—the requisite "status" being engagement in "maritime employment . . . (including any ship repairman, shipbuilder, and shipbreaker)." *See Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 313-20 (1983); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977).[18]

---

[17] By the terms of Section 3(a) of the LHWCA, 33 U.S.C. § 903(a) [App. at 93a], coverage under the Act extends to all "employee[s]" as defined in Section 2(3).

[18] As amended, Section 2(3) provides that:

> The term "employee" means *any person engaged in maritime employment*, including any longshoreman or other person en-

The other problem which Congress sought to address in 1972 related to the pleas of "employer groups" for the "modification of a long line of Supreme Court rulings" concerning the tort liability of shipowners. *Id.* at 1, 1972 *U.S. Code Cong. & Admin. News*, at 4699. Specifically, Congress was concerned (i) that vessel owners were being subjected to the imposition of strict liability under the "unseaworthiness" doctrine recognized in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and its progeny and (ii) that large portions of those strict-liability recoveries were being passed on to LHWCA-covered employers under the implied contractual indemnity theory articulated in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and its progeny. *See id.* at 5, 1972 *U.S. Code Cong. & Admin. News*, at 4701-05.

Congress reacted to this very specific concern with very specific legislation. First—and, in its view, foremost—it eliminated the *Sieracki*-based strict-liability "unseaworthiness" remedy, thus making vessel-owners liable only for their own negligence, "just as land-based third parties . . . are liable for damages when, through their fault, a worker is injured." *Id.* at 4, 1972 *U.S. Code Cong. & Admin. News*, at 4702. Then, it acted to prohibit any third-party recovery *by a vessel* against an LHWCA-covered employer. *See id.* at 7, 1972 *U.S. Code Cong. & Admin. News*, at 4704. The House of Representatives Committee on Education and Labor explained the 1972 amendment of Section 5 as follows:

> One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of ves-

---

gaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker [with certain exceptions not here applicable].

33 U.S.C. § 902(3) [App. at 93a] (emphasis added).

sels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a *longshoreman or other worker covered under this Act* is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel . . . .

• • • •

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

> *Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel*, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness.

*Id.* at 4, 6, 1972 *U.S. Code Cong. & Admin. News*, at 4701-02, 4703 (emphasis added),[19]

Thus, as amended in 1972, Section 5(b) of the LHWCA —the provision here at issue—provides that:

> In the event of injury *to a person covered under this chapter* caused by the *negligence of a vessel*, then such person . . . *may bring an action* against such vessel . . . .

33 U.S.C. § 905(b) [App. at 92a] (emphasis added).[20] The remedy made available by Section 5(b) is expressly made available to *all persons covered* under the LHWCA. And, as discussed above, coverage under the LHWCA extends, pursuant to Section 3(a), to any "employee" as defined by Section 2(3) of the Act. *See* pages 11-12 and note 17 *supra*.

The decision of the court of appeals below—that the Section 5(b) remedy is available only to those LHWCA-covered workers who can additionally demonstrate that they independently satisfy judicially developed criteria

---

[19] *See also id.* at 22, 1972 *U.S. Code Cong. & Admin. News*, at 4719 ("This section amends section 5, adding a new subsection (b) which provides that a *person covered under this Act* who is injured due to the negligence of a vessel may sue the vessel for damages.") (emphasis added).

[20] As noted above, Congress amended Section 905(b) in 1984, prospectively to preclude tort actions of any kind against LHWCA employers, even in a vessel-owner capacity. *See* Public Law No. 98-426, §§ 5(a)(1), 28(c), 98 Stat. 1641, 1655; note 2 *supra*. The amendment has no effect either upon litigation such as the instant case (which involves pre-amendment injuries) or upon cases like *Drake* (in which the negligent vessel owner is not the injured party's employer).

for general admiralty jurisdiction—flies in the face of the clear language of the statute, the statute's legislative history, and the prior decisions of at least two other courts of appeals and, indeed, of this Court.

### II. The Decision of the Court of Appeals Conflicts With Prior Decisions of the United States Courts of Appeals for the Fifth and Ninth Circuits.

The ruling of the court of appeals below—that a shipyard worker engaged in maritime employment within the meaning of Section 2(3) of the LHWCA may not sue a negligent vessel owner under Section 5(b) of that Act unless he is able to demonstrate that his cause of action independently satisfies the general admiralty jurisdiction "nexus" criterion of *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972)—conflicts directly and irreconcilably with the prior rulings of at least two other courts of appeals.

In *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), and in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom. Avondale Shipyards v. Rosetti*, 54 U.S.L.W. 3212 (U.S. Oct. 7, 1985), the courts of appeals fairly and accurately construed the terms of the LHWCA as amended in 1972 and ruled, expressly and unequivocally, that a person engaged in maritime employment within the meaning of Section 2(3) of the LHWCA *is* entitled to sue a negligent vessel owner under Section 5(b) of the Act *irrespective* of his ability independently to satisfy the general jurisdictional "nexus" requirement of *Executive Jet*. In each case, the court recognized that "maritime employment"—as expressly defined by Congress in the LHWCA—is *itself* a "maritime activity," and does *itself* constitute a sufficient "nexus" for the maintenance of a vessel-owner action under Section 905(b). In *Perkins*, the Court of Appeals for the Ninth Circuit ruled that:

> [The plaintiff] was engaged in maritime employment for purposes of the status test set forth in 33

> U.S.C. § 902(3). We believe that this factor alone constitutes a sufficient nexus to traditional maritime activity to create admiralty jurisdiction in this case.

673 F.2d at 1101. Two years later, in *Hall*, the Court of Appeals for the Fifth Circuit reached the same conclusion:

> For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet*'s requirement that the injury be in a "traditional maritime activity") was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoremen's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity involved in injuries to these amphibious workers. Thus, shipbuilding employees injured in constructing a vessel on navigable waters are regarded by § 905(b) as no less injured in a maritime employment than they were, before the enactment of § 905(b) in 1972, by the pre-1972 jurisprudence.

746 F.2d at 303. The conflict between those decisions and the decision below is real; it is clear;[21] and it is significant.

---

[21] In its opinion in *Drake*—by which the decision below was expressly "governed" (772 F.2d at 1030 [App. at 13a])—the Court of Appeals for the First Circuit itself acknowledged that its ruling conflicts squarely with the Fifth Circuit decision in *Hall*:

> We recognize that there are cases which have either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under § 905(b). These are *Landy* v. *Litton Systems, Inc.*, 624 F.2d 390 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), *McCarthy* v. *The Bark Peking*, 716 F.2d 130 (2d Cir. 1983), and *Hall* v. *Weeks Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). Of these, only the *Hall* opinion requires discussion, for it utilizes and extends the analysis used in the prior two cases.
>
> * * * *
>
> Insofar as the *Hall* panel held that only maritime torts are cognizable under § 905(b) we are in agreement. Our disagreement lies in that court's creation of a double standard for

When it amended the LHWCA in 1972, Congress intended to create a remedy in tort for *any* "person covered by [the LHWCA]" injured by the negligence of a vessel owner.[22] It did *not* impose any other jurisdictional prerequisites, and it did *not* empower the courts to create any such extraneous prerequisites. The Courts of Appeals for the Ninth and Fifth Circuits, in *Perkins* and in *Hall*, recognized this obvious fact; the Court of Appeals for the First Circuit, in *Drake* and in this case, did not.

The court below has seen fit by judicial fiat to eliminate the congressionally conferred vessel-owner remedy for any LHWCA-covered worker who is unable to prove (independently of his maritime employment) that his cause of action otherwise "bear[s] a significant relationship to traditional maritime activity" as that phrase was used by this Court in *Executive Jet*.[23] Such a result is

---

maritime tort jurisdiction. For actions brought under § 905(b) the Fifth Circuit would apparently revert to pre-1972, and pre-*Executive Jet* standards and apply only a situs test; for actions under general maritime jurisdiction, it would require satisfaction of both the situs and nexus tests.

> We discern no basis for this construction of the jurisdictional range of § 905(b). . . . We have discerned no predicate for the Fifth Circuit's unusual rule in law, logic, legislative history, or policy and we decline to hold that jurisdiction under § 905(b) requires satisfaction merely of the definitional elements of the provision, and the situs requirement.

*Drake v. Raymark Industries, Inc.*, *supra*, 772 F.2d at 1016-17, 1018 [App. at 76a-77a, 79a-80a] (footnote omitted).

[22] As discussed above, uniformity in the treatment of all persons covered by the LHWCA was a major objective of the 1972 amendments to that statute. *See* pages 11-12 *supra*.

[23] It is inconceivable, of course, that Congress intended in October of 1972 (when it amended the LHWCA) to adopt and incorporate into the statute jurisdicitonal concepts not even announced by this Court until December of 1972 (when it decided *Executive Jet*). Nor is it conceivable, Eagle-Picher submits, that this Court intended by its *Executive Jet* decision *sub silencio* to alter or rearrange the

improper and unfair, and gives rise to a situation in which the substantive federal rights of maritime workers—and those of unrelated third parties, such as Eagle-Picher here, who suffer losses as the result of vessel-owner negligence—are materially different in the First Circuit than they are elsewhere in the country. The resultant disparity can be eliminated only by a definitive resolution of the issue by this Court.

### III. The Decision of the Court of Appeals Conflicts With Prior Decisions of This Court.

In 1983, this Court specifically and unequivocally rejected the notion that coverage under the LHWCA is dependent upon a maritime worker's ability to satisfy the general jurisdictional "nexus" requirement of *Executive Jet*. Specifically, in *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), the Court was asked to restrict coverage under the LHWCA by superimposing the *Executive Jet* concept of "nexus" upon the congressionally established "status" requirement embodied in the Act's definition of "maritime employment." It emphatically refused to do so:

> Perini cites our decision in Executive Jet . . . and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced . . . .
>
> The explicit language of Executive Jet makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction [under 28 U.S.C. § 1333

---

statutory scheme so carefully created by the Congress just two months earlier. Yet the decision below rests squarely on the court's having ascribed such fanciful intentions to the Congress and to this Court. *See* 772 F.2d at 1030 [App. at 13a-14a]; *Drake v. Raymark Industries, Inc., supra*, 772 F.2d at 1012, 1014 [App. at 67a-68a, 71a-72a].

> (1)] to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U.S. at 265, 266. . . . Although the term "maritime" occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the [LHWCA], these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1050 (CA5 1982). . . .

459 U.S. at 320 n.29.[24] The decision below—which restricts the availability of a remedy expressly conferred by Congress in the LHWCA through the superimposition of jurisdictional concepts relevant only to 28 U.S.C. § 1333(1)—conflicts with this Court's ruling in *Perini*.[25]

---

[24] "In addition," the Court went on, "Churchill [like the injured maritime employees here], as a maritime construction worker, was by no means 'fortuitously' on the water when he was injured." *Id.*

[25] The appellate court's half-hearted attempt to distinguish *Perini* from *Drake* (and the instant case)—"*Perini* was concerned solely with *compensation* [under the LHWCA], and not with maritime tort jurisdiction" (*Drake v. Raymark Industries, Inc., supra*, 772 F.2d at 1018 [App. at 79a] (emphasis in original))—serves only to highlight the conflict between the decisions. In the first place, general admiralty tort jurisdiction is not an issue here; the substantive availability of a federal tort remedy is. *See id.* at 1014 n.3 [App. at 72a]. Furthermore, *compensation under the LHWCA* and the *availability of a vessel-owner tort remedy under Section 905(b)* are *both expressly* provided by the Act to *all* "employees" "covered" by the statute. *Compare* 33 U.S.C. §§ 904(a), 907(b), 908, 909 (compensation) *with* 33 U.S.C. § 905(b) (tort remedy against negligent vessel owner) *and* 33 U.S.C. §§ 903(a), 902(3) (LHWCA coverage and definition of "employee"). *See also* H.R. Rep. No. 92-1441, *supra*, at 6, 1972 *U.S. Code Cong. & Admin. News*, at 4703 ("*Persons to whom compensation is payable under the Act* retain the right [under Section 5(b)] to recover damages for negligence against the vessel . . . .") (emphasis added). This Court ruled in *Perini* that coverage under the LHWCA is to be determined without regard to the general jurisdictional "nexus" requirement of *Executive Jet*; and the LHWCA expressly provides a vessel-owner remedy to any "person covered" by the statute. 33 U.S.C. § 905(b). The conflict

Ironically, the decision below also conflicts with the very decision of this Court upon which it purports to rely. This Court's decision in *Executive Jet* was expressly and very carefully limited so as *not* to create new barriers to congressionally authorized causes of action:

> For the reasons stated in this opinion we hold that, *in the absence of legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.[26]

---

[26] Some such flights . . . no doubt involve passage over "the high seas beyond a marine league from the shore of any State." To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is "legislation to the contrary" [and tort remedies provided by that statute *are* available without reference to the general jurisdictional "nexus" requirement].

409 U.S. at 274 & n.26 (emphasis added); *see id.* at 268. Here, the terms of the LHWCA are obviously applicable, and they expressly provide a tort remedy for all persons covered by that Act. The LHWCA therefore constitutes "legislation to the contrary" which precludes the judicial imposition of extraneous barriers to the assertion of rights thereunder.

The decision below therefore conflicts also with *Executive Jet* itself.

---

between the decision below and this Court's decision in *Perini* is clear and irreconcilable.

## CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted.

Respectfully submitted,

JOE G. HOLLINGSWORTH
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 393-8535
*Attorney for Petitioner*

*Of Counsel:*
SPRIGGS, BODE & HOLLINGSWORTH
DONALD W. FOWLER
EDWARD M. FOGARTY

January 24, 1986